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VIA FACSIMILE AND UNITED STATES MAIL

Chief
Marine Mammal Conservation Division
Office of Protected Resources
NMFS (F/PR2)
1315 East-West Highway,
Silver Spring, MD 20910
301-713-0376 (Fax)

Re: Authorization for Commercial Fisheries Under the Marine Mammal Protection Act of 1972; Zero Mortality Rate Goal, 69 Fed. Reg. 23477 (April 29, 2004).

Dear Ms. Wieting:

Oceana welcomes this opportunity to submit comments concerning the proposed rule to implement the Marine Mammal Protection Act (MMPA) requirement to "reduce incidental mortality and serious injury of marine mammals" incidental to commercial fisheries "to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1387(b)(1). Oceana supports the National Marine Fisheries Service's approach to defining the Zero Mortality Rate Goal (ZMRG) based on biological analysis, rather than considerations of economics and technology, but incorporates and reasserts its earlier comments of September 8, 2003 concerning the need to make the ZMRG regulations as protective as Congress intended.

Bycatch is one of the most serious environmental impacts of fisheries. The MMPA's legislative history shows that Congress intended the Fisheries Service not only to reduce bycatch to restore marine mammal populations to healthy levels, but also to reduce incidental marine mammal takes in commercial fisheries to the lowest levels possible.

OCEANA SUPPORTS AN INITIAL DEFINITION OF ZMRG AS 10% OF A MARINE MAMMAL POPULATION'S POTENTIAL BIOLOGICAL REMOVAL

Oceana supports setting a ceiling on ZMRG of 10% of a population's potential biological removal, and therefore supports, in part, the Fisheries Service's proposed definition. Setting 10% of PBR as a maximum mortality rate (option 1 for the definition of ZMRG) will insure that incidental mortality does not significantly injure marine mammal populations. This definition is familiar to the Fisheries Service's constituents, is easy to calculate, and can be used in conjunction with the current List of Fisheries,

published each year outlining fisheries categories and marine mammal takes.

Additionally, the Environmental Assessment (EA) for the proposed rule reports that relative to the other options, option 1 (Alternative 2 in the EA), “would have the greatest positive impacts by indicating the need for the greatest reduction of incidental mortality and serious injury of marine mammals that interact with commercial fisheries.” The report adds that Alternative 2 is “the most protective of endangered stocks because it would allow endangered stocks only a one-percent recovery delay,” (EA at 4-4) since Alternative 2 is the only alternative that protects stocks to different degrees depending on their abundance status (EA at 4-8). Therefore, Alternative 2, defining ZMRG as 10% of PBR, gives greater protection to endangered marine mammal populations, consistent with legislative intent (EA at 4-8).

Oceana supports the Fisheries Service’s determination that technology and economic factors cannot be considered in determining ZMRG. The 1981 bill allowed purse seiners to satisfy ZMRG by using existing technology, *see* H. R. Rep. No. 97-228, at 17 (1981), but left ZMRG unchanged for other commercial fisheries in order to continue “to stimulate new technology for reducing the incidental taking of marine mammals.” *Id.* at 17-18. Thus, the Fisheries Service correctly determined that “ZMRG does not contain a provision for a technology standard” 69 Fed. Reg. 23488 (April 29, 2004).

The Fisheries Service correctly interpreted the MMPA’s mandates that technology and economic factors should not be considered in setting ZMRG under Section 118(b)(1) or in establishing six month take reduction plans required to reduce mortalities in strategic stocks to potential biological removal levels under Section 188(f)(2). “The requirement in 118(b)(1) provides no allowance for consideration of economics and technology in fisheries having reduced incidental mortality and serious injury to insignificant levels approaching a zero rate.” 69 Fed. Reg. 23478 (April 29, 2004). Further, “the assessment of whether or not fisheries have reduced incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate is independent of available technology and economic feasibility.” 69 Fed. Reg. 23488 (April 29, 2004). These provisions reflect the legislative language and intent of the MMPA.

Oceana recognizes that technology and economic factors may be taken into account when determining the appropriate measures to implement a take reduction plan. MMPA section 118(f)(2) states that incidental deaths must be reduced “to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans”. Oceana reiterates that the management measures recommended by the take reduction teams and implemented through take reduction plans are the appropriate places to consider economics and technology, not the determination of the zero mortality rate goal.

THE FISHERIES SERVICE MUST COUNT AND CAP MARINE MAMMAL BYCATCH AT EXISTING LEVELS

The statute not only requires that marine mammal takes be reduced to “insignificant levels,” but also that such levels be “approaching a zero mortality and serious injury rate.” 16 U.S.C. § 1387(a)(1). Under Alternative 2 in the EA, some commercial fisheries will be allowed to kill more marine mammals than are currently taken. For example, Alternative 2 would allow fisheries affecting beluga whales to kill 105 belugas a year, even though the current mortality estimate is less than 1 a year. Because the statutory goal is to approach a zero mortality and serious injury rate, the ZMRG definition must have a component that describes current performance and requires, at a minimum, that there be no backsliding. Accordingly, in addition to limiting takes to no higher than 10% of PBR, the definition of ZMRG should limit takes to no higher than current levels. As the EA describes, “[s]uch a criterion would satisfy the intent of minimizing incidental mortality and serious injury of marine mammals as much as possible” (EA at 2-7).

In its response to comments, the Fisheries Service relies on insufficient data as the reason for not setting a cap level, stating that “[s]etting allowable mortality levels no higher than the current levels of takes would include an assumption that the reported or estimated number of takes represents all that are occurring.” 69 Fed. Reg. 23489 (April 29, 2004). Stating that observer coverage is available for only a few fisheries, the Fisheries Service concedes that “current levels of incidental mortality and serious injury can not be verified independently and may exceed current estimates.” *Id.* This response is unacceptable. The Fisheries Service may not rely on its failure to collect data it requires to manage fisheries and protect the environment, to excuse it from its duties to collect the data, manage fisheries, and protect the environment. If the Fisheries Service needs data, it must collect data.¹

MMPA section 118(d) requires the Secretary to establish a program to, “obtain statistically reliable estimates of incidental mortality and serious injury.” The response to comments admits that the Fisheries Service is currently in violation of MMPA section 118(d). This admission of a continuing violation of federal law raises great concern for all fisheries that interact with marine mammals. Therefore, the Fisheries Service must act immediately to cure the violation. A recent study by Babcock et al. recommended that when the type and amount of bycatch is unknown, at a minimum, 20% observer coverage is needed when the bycatch is a commonly caught species and 50% is necessary for species caught rarely (Appendix A), to accurately and precisely determine the total bycatch. Following the best available science, the Fisheries Service must immediately implement a minimum 50% observer coverage for fisheries that have insufficient data concerning bycatch and interact with marine mammals. Based on this adequate observer coverage, the Fisheries Service must establish current take levels, cap takes at those levels (even if the levels are lower than 10% of PBR), and establish take reduction teams to bring takes down to PBR if it discovers that take levels are higher.

¹ On February 28, 2002, Oceana petitioned the Fisheries Service to establish a program to count, cap, and control bycatch, including bycatch of marine mammals.

NMFS SHOULD PERIODICALLY REVISIT THE DEFINITION OF ZMRG FOR EACH POPULATION TO ENSURE THAT TAKES CONTINUE AT INSIGNIFICANT LEVELS APPROACHING A ZERO MORTALITY RATE

Because ZMRG means not just reducing takes to “insignificant levels,” but striving always to approach a zero mortality rate, defining ZMRG based on current take and mortality levels is necessary but not sufficient. Congress intended the MMPA to completely eliminate marine mammal deaths incidental to fisheries if possible: “the objective of regulation would be to approach as closely as is feasible the goal of zero mortality and injury to marine mammals.... It may never be possible to achieve this goal, human fallibility being what it is, but the objective remains clear.” (H. R. Conf. Rep. No. 92-1488 at 23).

Oceana reiterates its earlier comments that the ZMRG for each population should be periodically revisited and gradually reduced to force improvements in technology and fishing practices to further minimize takes and mortality. The Fisheries Service asserts that “the MMPA states that once a fishery has achieved target levels of incidental mortality and serious injury, that fishery does not have to further reduce such mortality and serious injury.” 69 Fed. Reg. 23489 (April 29, 2004). Oceana is not suggesting that fisheries further reduce below the insignificance threshold, but rather that under the Act, the insignificance threshold should be revisited as marine mammal populations increase to ensure that the threshold level is a level “approaching” zero.

CONCLUSION

In conclusion, Oceana supports, in part, the Fisheries Service’s proposed definition of ZMRG and its interpretation of the role of economics and technology in the take reduction plan process. Oceana urges the Fisheries Service immediately to cure the violation of MMPA section 118(d) that it admitted in its responses to comments. Oceana reminds the Fisheries Service that while the proposed rules’ definition of ZMRG is a good start, the MMPA requires the government to count, cap, and control mortality, including establishing mortality caps at no higher than current mortality rates and establishing a mechanism to encourage mortality rates to continue approaching zero. We would be pleased to talk with you and your staff about the concerns expressed in this letter.

Sincerely,

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